(3)

No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents have asserted that Georgia's Petition for Writ of Certiorari should be denied because the issue of the Equal Protection Clause of the Fourteenth Amendment was not raised in the Georgia Supreme Court (Respondents' Brief, p. 2).

Respondents are clearly incorrect. In its application for interlocutory review the State asserted that the discriminatory exercise of peremptory strikes implicated the Fourteenth Amendment (Appendix D, App. 2). The State cited *Edmondson v. Leesville Concrete Company, Inc.*, 59 U.S. Law Wk. 3286 (Oct. 1, 1990), which at that time was

pending but not yet decided by this Court (Appendix D, App. 3).

The Georgia Supreme Court granted interlocutory review and stated that it was "particularly concerned with" the State constitutional issue (Respondents' Appendix 2). For this reason, the State's original brief focused on State constitutional issues (Appendix E, App. 6-8). However, the State also asserted this argument:

> [T]he racially motivated exercise of peremptory strikes discriminates against the jurors. A person's race is unrelated to his fitness as a juror, and no person should be peremptorily struck simply because of the color of his or her skin. *Batson v. Kentucky*, 476 U.S. at 87. . . .

(Appendix E, App. 9).

Rule 41 of the Georgia Supreme Court provides, "Supplemental briefs may be filed without permission any time before decision." In the Georgia Supreme Court the State filed two supplemental briefs (Appendices F & G, App. 12-15). In these two briefs the State asserted that racial discrimination by a defendant in exercising his peremptory strikes was barred by the Equal Protection Clause of the Fourteenth Amendment, and the State pointed out this Court's intervening decisions in *Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991), and *Edmondson v. Leesville Concrete Company*, 500 U.S. ___, 111 S. Ct. ___, 114 L.Ed.2d 660 (1991). (Appendices F & G, App. 12-15).

As reflected in Justice Benham's dissent, the four-member majority of the Georgia Supreme Court did not decide the case on State constitutional grounds (Petition

for Writ of Certiorari, Appendix B, App. 8-11). Instead, the four-member majority decided the case on federal grounds and held that, under *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 111 S. Ct. ___, 114 L.Ed.2d 660 (1991) a criminal defendant is not prohibited from exercising his peremptory strikes in a racially discriminatory manner (Petition for Writ of Certiorari, Appendix B, App. 3).

Contrary to Respondents' assertions, the Fourteenth Amendment issue raised in this Petition for Writ of Certiorari was presented to the Georgia Supreme Court, which decided the case on federal constitutional grounds. The State of Georgia respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX D

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA, Appellant, v. THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM, Appellees.	*	CASE NO. ___

STATE OF GEORGIA'S APPLICATION FOR INTERLOCUTORY APPEAL

(Filed Oct. 24, 1990)

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QUESTION PRESENTED

In a matter of first impression for this Court, when there is an indictment for assaultive crimes against black victims, do white defendants have the right to exercise their peremptory strikes in a racially discriminatory manner?

JURISDICTION

This case falls within the exclusive jurisdiction of this Court because the appeal involves a construction of the Sixth and Fourteenth Amendments of the United States Constitution and a construction of Georgia Constitution, Art. I, Sec. I, Para. XI. *See* Ga. Const. Art. VI, Sec. VI, Para. II.

ARGUMENT AND CITATION OF AUTHORITY

Appellees, who are white, were indicted for assaultive crimes against the victims, who are black (Exhibit 1; Exhibit 2, p. 1, para. 2; Exhibit 3, p. 1). The State filed a pre-trial motion to prohibit Appellees from exercising their peremptory strikes in a racially discriminatory manner (Exhibit 2). The trial court held that neither Georgia nor federal law prohibited criminal defendants from exercising their peremptory strikes in a racially discriminatory manner but certified the question for immediate review (Exhibit 3).

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that purposeful racial discrimination by the prosecutor in the selection of the venire is unconstitutional. However, the Supreme

Court explicitly stated, "We express no views as to whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Id.* 476 U.S. at 89, n. 12.

The Eleventh Circuit has held that the principles of *Batson* apply to civil cases. *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert. denied*, ___ U.S. ___ (1989). At present the United States Supreme Court has the issue before it of whether the principles of *Batson* do indeed apply to civil cases. *Edmonson v. Leesville Concrete Co.*, 59 U.S. Law Wk. 3286 (Oct. 1, 1990). Other states have decided that either the state constitution or a state statute requires that neither the state nor the defendant be racially discriminatory in the exercise of peremptory strikes. *See, e.g., State v. Neil*, 457 So.2d 481, 486 (S.C. Fla. 1984); *People v. Pagel*, 232 Cal. Rptr. 104, 107 (1986), *cert. denied*, 481 U.S. 1028 (1987).

The unsettled question is whether the United States Constitution or Georgia's constitutional guarantee of a trial by an impartial jury prohibits a criminal defendant from exercising his peremptory strikes in a racially discriminatory manner. The establishment of a precedent concerning this issue is desirable, Ga. S.Ct. Rule 22(3); and the only way the State can reach this issue in this case is for the Court to grant its application for interlocutory review. If no review is granted at this time and Appellees are acquitted, jeopardy attaches. Even if Appellees are convicted, the State would have no power to enumerate as error the trial court's failure to prohibit Appellees from exercising their peremptory strikes in a racially discriminatory manner.

Therefore, the State of Georgia, by the Attorney General, respectfully urges that this Court grant an interlocutory appeal in this case.

Respectfully submitted,

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Attorney General

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APPENDIX E

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA, Appellant, v. THOMAS MCCOLLUM, WILLIAM JOSEPH MCCOLLUM, and ELLA HAMPTON MCCOLLUM, Appellees.	*	CASE NO. S91A0310

BRIEF ON BEHALF OF APPELLANT
STATE OF GEORGIA
BY THE ATTORNEY GENERAL

ENUMERATION OF ERROR

The trial court erred by ruling that a criminal defendant may use his peremptory strikes in a racially discriminatory manner.

JURISDICTION

The trial court denied the State's pretrial motion to prohibit Appellees, the criminal defendants, from exercising their peremptory strikes in a racially discriminatory manner. The trial court certified the issue for appeal (R. 48-49), and this Court granted the State's application for interlocutory review (R. 3). Jurisdiction lies in this Court because the issue presented involves the construction of

the Georgia Constitution. *See* Ga. Constitution, Art. VI, Sec. VI, Para. II.

STATEMENT OF THE FACTS

Defendants, who are white, were indicted by a Dougherty County grand jury for several assaultive crimes against Myra and Jerry Collins, who are black (R. 12-14, 39, 48). The State filed a pretrial motion to prohibit Defendants from using their peremptory strikes in a racially discriminatory manner. (R. 39-45). A hearing was held and the State's motion was denied. (R. 48-49).

ARGUMENT & CITATION OF AUTHORITY

Georgia's Constitutional Mandate That a Criminal Defendant Shall Have a Trial by an Impartial Jury Precludes a Criminal Defendant from Using His Peremptory Strikes in a Racially Discriminatory Manner.

The Georgia Constitution mandates, "In criminal cases, the defendant *shall have* a public and speedy *trial by an impartial jury*. Art. I, Sec. 1, Para. XI (Emphasis added). The Sixth Amendment to the United States Constitution gives "the accused . . . *the right to* a speedy and public trial, by an impartial jury [emphasis added] . . . . " "[U]nder the Sixth Amendment, neither prosecutor nor defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a petit jury." *Booker v. Jabe*, 775 F.2d 762, 772 (6th Cir. 1985), *vacated* 478 U.S. 1001 (1986), *opin. reinstated* 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), was decided on equal protection grounds, and the Supreme Court explicitly stated, "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Id.*, 476 U.S. at 89 n. 12; 106 S.Ct. at 1719 n. 12; 90 L.Ed.2d at 82 n. 12.

Although the United States Supreme Court has not decided this issue, numerous state courts have. The Florida Supreme Court has held that under the Florida constitutional guarantee of the right to an impartial jury, both the state and the defense may challenge the proper use of peremptory strikes. *State v. Neil*, 457 So.2d 481, 486-87 (Fla.S.Ct. 1984). "The state, no less than a defendant, is entitled to an impartial jury." *Id.* at 487.

The Massachusetts Supreme Court also decided that its state constitutional guarantee of an impartial jury entitles the commonwealth "to a representative jury, unimpaired by improper exercise of peremptory strikes by the defense." *Commonwealth v. Soares*, 387 N.E.2d 499, 508, 517 n. 35 (Mass.S.Ct. 1979), *cert. denied*, 444 U.S. 881 (1979); *Commonwealth v. Reid*, 424 N.E.2d 495, 500 (Mass.S.Ct. 1981).

California appellate courts have reached the same result but have based their decisions on their state constitutional requirement to have a jury drawn from a representative cross section of the community. *See, e.g., People v. Pagel*, 232 Cal.Rptr. 104, 106 (1986), *cert. denied*, 481 U.S. 1028 (1987); *People v. Wheeler*, 583 P.2d 748 (Cal.S.Ct. 1978). "[T]he People no less than individual defendants are entitled to a trial by *an impartial jury* drawn from a

representative cross section of the community." *People v. Pagel*, 232 Cal.Rptr. at 107; *People v. Wheeler*, 583 P.2d at 765 n. 29 (Emphasis added).

Reported trial court decisions from New York and New Jersey have held that a criminal defendant may not exercise his peremptory strikes in a racially discriminatory manner. *See, e.g., People v. Gary M.*, 526 N.Y.Supp.2d 986 (Kings Cty.,N.Y.,S.Ct. 1988); *State v. Alvarado*, 534 A.2d 440 (Union Cty.,N.J.,Sup.Ct. 1987).

In the jury selection of a criminal case, three entities, in addition to the defendant, have a right to a fair and impartial jury. Although the victim is not a party in a criminal case, his or her interests, both emotional and sometimes financial, can be vitally affected. "It is declared to be the policy of this state that restitution to their victims by those found guilty of crimes is a primary concern of the criminal justice system." O.C.G.A. § 17-14-1. Georgia's constitutional requirement that the criminal defendant have an impartial jury, not one biased in his favor, means the victim is also entitled to an impartial jury.

Second, society is entitled to an impartial jury in the trial of a criminal defendant. The racially discriminatory exercise of peremptory strikes by either the state or the defendant undermines confidence in the fairness of our system of justice. *See generally, Batson v. Kentucky*, 479 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81. Moreover, if a society believes that a criminal defendant is able to obtain an acquittal by the racially discriminatory use of peremptory strikes, there can be the motivation for self-help and vigilante justice. *See generally, Conner v. State*, 251 Ga. 113,

120, 303 S.E.2d 266, (1983), *cert. denied*, 464 U.S. 865 (1983). Where the state proves the defendant guilty beyond a reasonable doubt, the purposes of criminal punishment – deterrence, protection of society, and retribution – should be carried out. *See generally, Conner v. State*, 251 Ga. at 120.

Third, the racially motivated exercise of peremptory strikes discriminates against the jurors. A person's race is unrelated to his fitness as a juror, and no person should be peremptorily struck simply because of the color of his or her skin. *Batson v. Kentucky*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81.

Peremptory challenges are not of constitutional dimension, O.C.G.A. § 15-12-165, and racially discriminatory challenges must give way to Georgia's constitutional requirement that the criminal defendant shall have an impartial jury. As Justice Marshall stated

> Our criminal justice system "requires not only freedom from bias against the accused but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."

Batson v. Kentucky, 476 U.S. at 107, 106 S.Ct. at 1729, 90 L.Ed.2d at 95 (J. Marshall concurring).

Georgia's mandate that the defendant shall have an impartial jury means that under our constitution, neither the State nor the criminal defendant can discriminate in jury selection. Therefore, the State respectfully prays this Court reverse the trial court and direct that the criminal

defendants in this case may not use their peremptory strikes in a racially discriminatory manner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 4th day of December, 1990.

/s/ Harrison Kohler
HARRISON KOHLER
Deputy Attorney General

APPENDIX F

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA,	*	
Appellant,	*	CASE
	*	NO. S91A0310
v.	*	
	*	
THOMAS McCOLLUM,	*	
WILLIAM JOSEPH McCOLLUM,	*	
and ELLA HAMPTON McCOLLUM,	*	
Appellees.	*	

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT STATE OF GEORGIA BY THE ATTORNEY GENERAL

In *Powers v. Ohio*, 59 U.S.L.W. 4268 (April 1, 1991), the United States Supreme Court held that a white criminal defendant had standing to assert the interest of black jurors from being peremptorily struck from the jury for racially discriminatory reasons. "[R]acial discrimination in the disqualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Id.*

That Court added:

> The purpose of the jury system is to impose upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset.

Id.

It is the position of the State that not only does Georgia's Constitution prohibit a defendant from exercising his peremptory strikes in a racially discriminatory manner, but also the Equal Protection Clause of the Fourteenth Amendment protects jurors from being struck by a criminal defendant for racially discriminatory reasons.

This 9th day of April, 1991.

Respectfully submitted,

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APPENDIX G

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA,	*	
Appellant,	*	CASE NO. S91A0310
v.	*	
THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,	*	
Appellees.	*	

SECOND SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT STATE OF GEORGIA BY THE ATTORNEY GENERAL

In *Edmondson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, 89-7743 (June 3, 1991), the United States Supreme Court held that private litigants in a civil case cannot be racially discriminatory in the exercise of peremptory strikes. In a civil trial the exclusion of jurors on account of race violates the prospective juror's equal protection rights. *Id.*

> By enforcing a discriminatory peremptory challenge, the court has not only made itself a party to the biased act but has elected to place its power, property, and prestige behind the alleged discrimination . . . and in a significant way has involved itself with invidious discrimination.

Id.

Clearly, the principles of *Batson* are not limited to the State, but are applicable to a criminal defendant. By exercising his peremptory strikes in a racially discriminatory manner, a criminal defendant violates both the Georgia Constitution and the Equal Protection Clause of the Fourteenth Amendment.

This 4th day of June, 1991.

Respectfully submitted,

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